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In the

Supreme Court of the United States

OCTOBER TERM, 1970

No. 461

JEROME TREMONT,
PETITIONER,

v.

UNITED STATES,
RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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INDEX

	Page
Opinion Below	1
Jurisdiction	2
Questions Presented	2
Statutory Provisions Involved	3
Statement of the Case	4
Reasons for Granting the Writ	8
1. The Decision Below Conflicts With A Decision Of The District Of Columbia Circuit On The Question Of Whether A Defendant May Be Convicted Of Making Or Causing To Be Made A False Statement In An F.H.A. Credit Application Where Such Statement Was Not False As To The Applicant	8
2. The Decision Below Conflicts With The Decisions Of Other Courts Of Appeals As To The Construction And Interpretation Of 18 U.S.C. 1010 And The Evidence Necessary To A Conviction Thereunder	10
Conclusion	12
Appendix A (Opinion of Court of Appeals)	13
Appendix B (Judgment of Court of Appeals)	20

CITATIONS

Cases

Blumenfield v. *United States*, 306 F.2d 892 (8th Cir. 1962)	13
Carvahlo v. *United States*, 307 F.2d 394 (D.C. Cir. 1962)	9, 10, 12
Jacobs v. *United States*, 359 F.2d 960 (8th Cir. 1966)	11
Ross v. *United States*, 180 F.2d 160 (6th Cir. 1950)	9, 10
United States v. *Resnick*, 299 U.S. 207 (1936)	11

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UNITED STATES,
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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

The Petitioner Jerome Tremont respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the First Circuit entered in this proceeding on June 29, 1970.

Opinion Below

The opinion of the Court of Appeals, not yet reported, appears in the Appendix hereto. No opinion was rendered by the District Court of Massachusetts.

Jurisdiction

The judgment of the Court of Appeals was entered on June 29, 1970. The Court of Appeals ordered a stay of mandate on July 13, 1970, pending application for certiorari. The petition for certiorari was filed within 30 days of the foregoing entry of judgment. This Court's jurisdiction is based on 28 U.S.C. § 1254 (1) and Rule 22 (2) of this Court.

Questions Presented

1. Whether a Defendant can be convicted of making or causing to be made a false statement in an F.H.A. credit application regarding the intended use of the proceeds of the loan, where the Defendant was not the applicant and where the applicant intended at the time of making such application to use the proceeds for the purposes specified.

2. Whether a Defendant can be convicted of making or causing to be made a false statement in an F.H.A. credit application where the Defendant was not the applicant but merely filled out the application form before its verification and execution by the applicant.

3. Whether the government's proof, that subsequent to the F.H.A. credit application the improvements actually made to the home of the applicant deviated somewhat from those listed in the application, substantially enlarged the offense of making a false statement that the proceeds of the loan would be used to improve the premises described in the indictment and constituted a fatal variance or whether such proof could constitute evidence that the Petitioner committed any offense under 18 U.S.C. § 1010.

4. Whether the government's proof, that the Petitioner filled out an F.H.A. credit application form prior to its

execution by the applicant, substantially enlarged the offense of making or causing to be made a false statement in an F.H.A. credit application described in the indictment and constituted a fatal variance or whether such proof could constitute evidence that the Petitioner committed any offense under 18 U.S.C. § 1010.

5. Whether there was no evidence that the Petitioner committed any offense under 18 U.S.C. § 1010.

Statutory Provisions Involved

FEDERAL RULES OF CRIMINAL PROCEDURE

Rule 7(c). Nature and Contents. The indictment or the information shall be a plain, concise and definite written statement of the essential facts constituting the offense charged.

UNITED STATES CODE, TITLE 18:

1010. *Federal Housing Administration Transactions.* Whoever, for the purpose of obtaining any loan or advance of credit from any person, partnership, association, or corporation with the intent that such loan or advance of credit shall be offered to or accepted by the Federal Housing Administration for insurance, or for the purpose of obtaining any extension or renewal of any loan, advance of credit, or mortgage insured by such Administration, or the acceptance, release, or substitution of any security on such a loan, advance of credit, or for the purpose of influencing in any way the action of such Administration, makes, passes, utters, or publishes any statement, knowing the same to be false, or alters, forges, or counterfeits any instrument, paper, or document, or utters, publishes, or

passes as true any instrument, paper, or document, knowing it to have been altered, forged, or counterfeited, or wilfully overvalues any security, asset, or income, shall be fined not more than $5,000 or imprisoned not more than two years, or both.

Statement of the Case

The jurisdiction of the district court was invoked because of an indictment and criminal prosecution instituted under a criminal statute of the United States.

The Petitioner was indicted for making or causing to be made a false statement in an F.H.A. credit application in violation of 18 U.S.C. § 1010. The text of the indictment was as follows:

COUNT I

On or about April 12, 1968, in Lynn, in the District of Massachusetts, JEROME TREMONT of Cambridge, in said District, for the purpose of causing a loan and advance of credit to be made by Lynn Safe Deposit and Trust Company, a corporation, to Gertrude A. Collins of Revere, in said District, with the intent that such loan and advance of credit would be offered to and accepted by the Department of Housing and Urban Development for insurance, and for the purpose of influencing action of such department, did wilfully and knowingly make, pass, utter and publish and cause to be made, passed, uttered and published to said Lynn Safe Deposit and Trust Company a certain false statement in a document executed by said Gertrude A. Collins entitled "Federal Housing Administration Credit Application for Property Improvement Loan," said JEROME TREMONT then knowing said statement

to be false, in that said Gertrude A. Collins stated and certified therein that the proceeds of such loan would be used to improve the premises numbered 15 Tobin Avenue, Revere, in said District, whereas in truth and in fact, as said JEROME TREMONT then knew and intended, said proceeds were not to be used to improve said premises as aforesaid; in violation of Title 18 U.S.C. 1010.

Gertrude A. Collins was not named as a defendant and there was no count for conspiracy.

The Petitioner had known Miss Collins since 1962, had given her financial advice for a number of years prior to 1968 (Tr. 2-5, 8), and had made various investments for her (Tr. 2-19). In 1965 she asked him to act as her agent in dealing with various contractors in connection with improvements to be made to her home (Tr. 2-6, 7).

In the Spring of 1968, (after discussing the subject with the Petitioner) Miss Collins decided to make further repairs to her home (Tr. 2-8). They anticipated that such repairs would cost in excess of $3,500 (Tr. 2-63). The Petitioner then arranged an F.H.A. loan for Miss Collins at the Lynn Safe Deposit and Trust Company, through Kenneth B. Smith, the loan manager (Tr. 2-8, 10, 27).

Also during the Spring of 1968 the Petitioner had been attempting to secure financing through Mr. Smith from the Lynn Safe Deposit and Trust Company for the purchase of an appliance business named National Sales Company (Tr. 1-110). Mr. Smith had informed the Petitioner that the bank would lend him an amount equal to his own investment in the business but because the Petitioner was having difficulty in raising capital it was suggested that Mr. Smith could approve a number of F.H.A. loans which were particularly advantageous because Smith

would authorize such loans for the greatest amount of money and for the longest term at the lowest interest rate (Tr. 1-110). Smith testified at the trial of this case that he could not remember whether it was he or the Petitioner who first suggested that F.H.A. loans be utilized for this purpose (Tr. 1-120).

Some time after the discussion between Mr. Smith and the Petitioner regarding the financing of the purchase of National Sales Company the Petitioner approached Mr. Smith to arrange the F.H.A. loan to be made to Miss Collins. On Friday, April 12, 1968, the Petitioner filled out an application form for such loan in Mr. Smith's office (Tr. 1-113). Miss Collins was not present at this time. On Monday, April 15, 1968, the Petitioner and Miss Collins went to Mr. Smith's office and Miss Collins read the form (Tr. 2-10), verified the statements made therein which she testified at trial were correct (Tr. 2-9 through 11), and signed it (Tr. 2-9). The F.H.A. application form was entitled "Credit Application for Property Improvement Loan". The space entitled "Property to be Improved" had been completed with Miss Collins' residence address and her name as title holder. The space requiring information as to how the proceeds would be used to improve the described property had been filled in with the words "Kitchen Remodeling" and "Bedroom Remodeling". Miss Collins executed a promissory note and received from Mr. Smith a bank check in the amount of $3,500 (Gov. Ex. 5).

At no time did Mr. Smith inform Miss Collins of what he testified to be "the real purpose" of the loan (Tr. 1-123) and there was no evidence to contravert Miss Collins testimony that when she executed the application she intended to use the proceeds of the loan for the pur-

poses specified therein, i.e., for renovations to her home. (Tr. 2-10, 11). Mr. Smith testified that insofar as he knew, Miss Collins' intentions to use the proceeds to improve her home were correctly stated on the loan application (Tr. 1-122).

After leaving the bank, Miss Collins endorsed the check over to the New Boston Realty Trust, of which the Petitioner was a Trustee.

Subsequent to the loan Miss Collins received estimates for various home improvements during the summer of 1968 (Tr. 2-13) and some work was done in September, 1968 and in May, 1969 (Tr. 1-91, 97). Although the total cost of such work was substantially less than $3,500, Miss Collins testified at trial that she had additional plans for more work. (Tr. 2-16). Only a portion of the work actually completed related to improvements to the kitchen or bedroom of her home.

Trial was held in the United States District Court for the District of Massachusetts. At the close of the government's case and at the close of the evidence, the Petitioner moved for a directed verdict of acquittal, both motions being denied. A jury then found the Petitioner guilty and he was sentenced by the Court to imprisonment for two years. On June 29, 1970, the judgment was affirmed by the Court of Appeals, which based its decision principally on the ground that the jury could find that the statement was false insofar as the defendant was concerned, irrespective of its truth or falsity as to the applicant, herself. (See Appendix A — pp. 13, 16)

REASONS FOR GRANTING THE WRIT

THE DECISION BELOW CONFLICTS WITH THE DECISIONS OF OTHER COURTS OF APPEALS AS TO THE PROPER SCOPE OF 18 U.S.C. § 1010.

The Decision Below Conflicts With A Decision Of The District Of Columbia Circuit On The Question Of Whether A Defendant May Be Convicted Of Making Or Causing To Be Made A False Statement In An F.H.A. Credit Application Where Such Statement Was Not False As To The Applicant.

The decision below confronts this Court with the important question of whether a defendant may be convicted of making or causing to be made a false statement in an F.H.A. credit application where the statements contained therein were true as to the applicant.

The government proceeded on the theory that if the applicant, Miss Collins, was guilty of making a false statement, the defendant was equally guilty. (See Appendix A —, p. 16, n. 5.) In the opinion below, however, the court of appeals gratuitously took upon itself the opportunity to affirm the conviction of the Petitioner "on the strength of [his] actions alone." (Appendix A — p. 16, n. 5). Thus, in spite of the uncontroverted testimony of the applicant that she read and verified the statements contained in the loan application, and that at the time she executed it she did intend to use the proceeds of the loan for the purposes specified, the court based its affirmation of the conviction "on the fact that the defendant himself made the statements in the form." (Appendix A — p. 16, n. 5). The effect of this decision is to eliminate the vital requirement of a false statement

from the offense of making or causing to be made a false statement proscribed by the statute.

The decision is clearly in conflict with that rendered by the District of Columbia Circuit in *Carvahlo* v. *United States*, 307 F.2d 394 (D.C. Cir. 1962). In that case the defendant transferred title of his property to a "straw" who made an application for a home improvement loan. As in the instant case it later developed that an amount of money equal to the amount of the loan had not been applied to the improvement of the property. The indictment charged the defendant with passing or causing to be passed a loan application containing a false statement, to wit, that the "straw" was the applicant and that she had purchased the property in question. The court held that despite the fact that the amount of the loan was not applied to the improvement of the property, the defendant could not be convicted where the statement as to the applicant was true.

As in *Carvahlo*, the applicant in the instant case knew what she was doing and knew that by signing the application she was pledging her credit in order to obtain the loan. As in that case, the government here "got what it bargained for: the house a security, and the credit responsibility of the actual applicant for the loan." 307 F.2d at 395. The case cited by the court in support of its decision, *Ross* v. *United States*, 180 F.2d 160 (6th Cir. 1950), (Appendix A — pp. 15, 16), involved a swindle where the defendants persuaded ignorant homeowners to sign blank F.H.A. forms and promissory notes in connection with their purchase of siding from the defendants. The homeowners did not know the nature of the documents they signed. False information regarding the financial status of the homeowners was subsequently filled in. The court of appeals in the instant case could "see no material distinction between obtaining a signature through duplicity

and then adding false information, as in *Ross*, and making a false statement prior to getting the signature, as was done here." (Appendix A — p. 16). This reasoning ignores the fact that like the applicant in *Carvahlo*, Miss Collins knew what she was doing in signing the application and intended to make the improvements. It assumes, contrary to *Carvahlo*, that the statements may be considered false as against the defendant even though demonstrably true as to the applicant. The effort of the court below to buttress its decision by stating that a jury might find that the applicant herself did not intend to use the proceeds for the purposes specified is equally in conflict with the reasoning of the D. C. Circuit which, in *Carvahlo*, refused to consider the "fact that some time later certain irregularities arose with respect to the use of the money advanced by the loan", 307 F.2d at 395.

It is of vital importance that this Court grant certiorari to resolve finally the questions of whether a defendant may be convicted of making a false statement when the statement was true as to the applicant and whether post-loan irregularities may be considered under an indictment charging an offense at the time the application is made.

2. The Decision Below Conflicts With The Decisions Of Other Courts Of Appeals As To The Construction And Interpretation Of 18 U.S.C. § 1010 And The Evidence Necessary To A Conviction Thereunder.

No decision of this Court or of any other court of appeals has affirmed a conviction under 18 U.S.C. § 1010 on facts similar to those in this case. The affirmance by the court of appeals converts the narrowly defined statutory offense of making a false statement in an F.H.A. loan

application into the much broader and nebulous offense of hoping or expecting to be able to persuade an F.H.A. loan applicant to put the proceeds of the loan to an improper use. This is clearly in conflict with the dictate of this Court that criminal statutes are to be strictly construed in favor of the accused and may not be extended to cases not covered by the words used. See *United States* v. *Resnick*, 299 U.S. 207 at 209-210 (1936). Other courts of appeals have similarly held in "false statement" cases that where a criminal conviction hangs in the balance the statute must be strictly construed. See, eg., *Jacobs* v. *United States*, 359 F.2d 960 (8th Cir. 1966) and *Blumenfield* v. *United States*, 306 F.2d 892 (8th Cir. 1962). This Court should grant certiorari in order to maintain the viability of its mandate that a person not be subjected to criminal liability for conduct not clearly and explicitly proscribed.

The injustice of a conviction for an offense not clearly proscribed by the statute was compounded in this case by the nature of the indictment and the facts upon which the conviction was based and affirmed. Rule 7 (c) of the Federal Rules of Criminal Procedure provides that the indictment shall be a "plain, concise and definite written statement of the essential facts constituting the offense charged." The indictment in this case tracked the language of the statute and charged the Petitioner with wilfully making or causing to be made a false statement that the proceeds of the loan would be used for home improvements. The conviction was based, however, on testimony that prior to the application the Petitioner and another conceived of a plan to misapply F.H.A. loan proceeds and on evidence that some time passed before improvements were made to the home of the applicant and those improvements were not to the bedroom and kitchen as stated in the application. Not only does this conflict with the deci-

sion in *Carvahlo, supra*, but it enlarges the offense from that proscribed by the statute and charged in the indictment so that the intent and meaning of the statute is in a state of confusion. This Court should grant certiorari because of this important statutory issue involving the construction and meaning of 18 U.S.C. § 1010 and the elements of a violation thereof.

Finally, certiorari should be granted in order that this Court may review other questions raised in the Questions Presented section of this Petition but not argued herein.

Conclusion

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the First Circuit.

Respectfully submitted,

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APPENDIX A

United States Court of Appeals
For the First Circuit

No. 7555

UNITED STATES OF AMERICA,
APPELLEE,

v.

JEROME TREMONT,
DEFENDANT, APPELLANT.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

Before ALDRICH, *Chief Judge*,
McENTEE and COFFIN, *Circuit Judges*.

James D. St. Clair, with whom *William E. Bailey* and *Hale and Dorr* were on brief, for appellant.
Joseph A. Lena, Assistant United States Attorney, with whom *Herbert F. Travers, Jr.* was on brief, for appellee.

June 29, 1970.

McENTEE, *Circuit Judge*. Defendant Tremont was convicted for violating 18 U.S.C. § 1010 by "making and causing to be made" a false statement in an FHA loan application. The single count of the indictment is reproduced in the margin.[1]

[1] "The Grand Jury Charges:
"COUNT I
"On or about April 12, 1968, in Lynn, in the District of Massachusetts, JEROME TREMONT of Cambridge, in said District, for the purpose of causing a loan and advance of credit to be made by Lynn Safe Deposit and Trust Company, a corporation, to Gertrude A. Collins of Revere, in said District, with the intent that such loan and advance of credit would be offered to and

It is undisputed that on April 15, 1968, Gertrude Collins,[2] in the presence of the defendant, signed an FHA application at the Lynn Safe Deposit and Trust Company. The application represented that the loan proceeds would be used to remodel the kitchen and bedroom of her house.[3] Defendant's principal contention on appeal is that the government failed to sustain the burden of proving that a false statement was made, because when Miss Collins executed the application she fully intended to use the money for the designated purpose. Absent proof of this essential element, it is argued, the conviction cannot stand. *Cavallo v. United States*, 307 F.2d 394 (D.C. Cir. 1962). This theory overlooks critical facts brought out at trial.

On April 12, Tremont paid a visit to the bank and met with Kenneth Smith, the loan officer. At that time, according to Smith's testimony, Tremont filled out the FHA form, including the portion stating the purpose for which the loan was to be used. When Miss Collins went to the bank on April 15, all she did was sign her name to the completed form.[3]

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accepted by the Department of Housing and Urban Development for insurance; and for the purpose of influencing action of such department, did wilfully and knowingly make, pass, utter and publish and cause to be made, passed, uttered and published to said Lynn Safe Deposit and Trust Company, a certain false statement in a document executed by said Gertrude A. Collins entitled "Federal Housing Administration Credit Application for Property Improvement Loan," said JEROME TREMONT then knowing said statement to be false, in that said Gertrude A. Collins stated and certified therein that the proceeds of such loan would be used to improve the premises numbered 15 Tobin Avenue, Revere, in said District, whereas in truth and in fact, as said JEROME TREMONT then knew and intended, said proceeds were not to be used to improve said premises as aforesaid; in violation of Title 18 U.S.C. 1010."

[2] Gertrude Collins was not named as a defendant, and no count for conspiracy was brought naming her as a co-conspirator.

[3] Miss Collins testified at trial that at the time she arrived at the bank the form was not completely filled out. The government

While very possibly Miss Collins did not read the paper she signed, in our opinion the jury could reasonably find that in point of fact she did not have the affirmative intention to use the proceeds of the loan for the purposes specified.[4] Although we do not reject this as a ground for our decision we rely principally on other grounds.

We find that the defendant's actions fit precisely within the words of the statute which applies to anyone who "for the purpose of influencing in any way the action of [the Department of Housing and Urban Development] makes . . . any statement knowing the same to be false. . . ." The fact that the defendant was not the borrower is of no consequence. *Ross v. United States*, 180 F.2d 160, 164 (6th Cir. 1950); *Hartwell v. United States*, 107 F.2d 359, 361 (5th Cir. 1939).

In *Ross* the defendants worked a swindle by approaching homeowners and convincing them to allow siding to be placed on their homes as a model on the understanding that they would be paid commissions for every sale made to their neighbors due to their cooperation. Each family to whom the pitch was successfully made was sworn to secrecy, enabling the defendants to gull many people in the same community. The applicants were persuaded to sign blank FHA forms and promissory notes, which were

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pointed out that she had testified before the grand jury that it had been completed prior to her arrival. Later, in her testimony, she made clear that the only thing she had trouble remembering was whether it was filled out before she came or while she was there, but left no doubt that the document was entirely filled in by Tremont.

[4] The loan was made on April 15. The following August she sought an estimate for the first time. She sought another estimate in September or October. These were not to remodel the kitchen or bedroom and no work was done. In May 1969, after the FBI had begun an investigation, she obtained another estimate on work which related in part to the kitchen and bedroom. Eleven hundred dollars worth of work was finally done, but only about fifty dollars of that pertain to the kitchen. No work was done on the bedroom.

later filled in with false information to make their financial situation appear more attractive. The notes were discounted by a credit corporation and insured by the FHA.

The court rejected the defense that the statute applies only to borrowers, on the ground that such a narrow construction would defeat the objectives of the Act. We see no material distinction between obtaining a signature through duplicity and then adding false information, as in *Ross*, and making a false statement prior to getting the signature, as was done here.[5]

Defendant argues that the statement contained in the loan application that the proceeds would be used to remodel the kitchen and bedroom could not be proved false merely because the money was used for other purposes as well. But there was ample evidence on which the jury could find that insofar as the defendant was concerned, the statement was indeed false.

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[5] We note that the theory of the prosecution is that if Miss Collins is guilty of making a false statement, the defendant is too. As our opinion indicates, we think the conviction can be upheld on the strength of the defendant's actions alone. This turns on the fact that the defendant himself made the statements in the form. At no time has the defendant raised any question of variance between the indictment and proof. Nonetheless, we think it meet to consider the possibility of a variance. *See United States* v. *Atkinson*, 297 U.S. 157, 160 (1936).

Allegations in the indictment must correspond to the proof so that the accused is sufficiently apprised of the charges to enable him to prepare his defense and protect him against double jeopardy. A variance to be fatal must "affect the substantial rights" of the accused. *Berger* v. *United States*, 295 U.S. 78, 82 (1935). By this standard, the proof offered by the government did not expand the indictment. *See* note 1, *supra*. *Cf. Stirone* v. *United States*, 361 U.S. 212 (1960). Moreover, the defendant was advised by a bill of particulars that he "took part in furnishing the information appearing in the FHA loan application, including the statements concerning home improvements to be made with the loan proceeds." Furthermore, when Smith testified that the defendant had filled out the form, no objection was made. Thus even if there were a variance, we are convinced it was harmless error. 8 J. Moore, Federal Practice ¶7.05 [1] at 7-25 (2d ed. 1969).

Smith testified that the defendant told him he needed money to buy into a business. They had discussed the matter in the spring of 1968, but the bank could not help him because he lacked investment capital. Smith had the authority to approve FHA loans, and they discussed the possibility of the defendant's obtaining such loans. In April the defendant called Smith to tell him that he had someone he thought would qualify. That person turned out to be Miss Collins, and the loan was made on April 15. In exchange for his helpfulness, Smith testified there was a possibility that he would go to work for the defendant's new business.

As soon as the defendant and Miss Collins left the bank, she endorsed the check over to the New Boston Realty Trust, of which the defendant was trustee. Prosecution witnesses traced disbursements from this account over a two week period, and testified to the various purposes, unrelated to home improvements, for which the money was spent.

The defendant contends that in due course work was subsequently done on Miss Collins' house. This was done so long after the event, and so much less than had been indicated, that the jury was clearly warranted in rejecting it as proof of the intent existing when the paper was signed. In light of this record, we deem the defendant's contention to be without merit.

Lastly, defendant argues that the failure of the court to give his requested instruction that § 1010 does not require a loan applicant to segregate the loan proceeds from his personal funds was prejudicial, when coupled with the evidence tracing the disposal of the loan proceeds for personal reasons. The court properly denied the instruction as irrelevant on the ground that the government had not suggested segregation of funds was necessary. Evidence pertaining to the actual use of the funds was

admitted on the question of the defendant's intent, and the jury was so instructed. There was no error.

Affirmed.

APPENDIX B

United States Court of Appeals
For the First Circuit

No. 7555.

UNITED STATES OF AMERICA,

APPELLEE,

v.

JEROME TREMONT,

DEFENDANT, APPELLANT.

JUDGMENT

Entered: June 29, 1970

This cause came on to be heard on appeal from the United States District Court for the District of Massachusetts, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The judgment of the District Court is affirmed.

By the Court:

DANA H. GALLUP
Clerk.

By: FRANCIS P. SCIGLIANO
Chief Deputy Clerk.

[cc. Messrs. Bailey and Lena.]